CONGRESSIONAL ASIAN PACIFIC AMERICANS CAUCUS
CAPAC

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December 22, 2014

The Honorable Jeh Johnson
U.S. Department of Homeland Security
3801 Nebraska Avenue, N.W.
Secretary of Homeland Security
Washington, D.C. 20528

Dear Secretary Johnson:

On behalf of the Congressional Asian Pacific American Caucus (CAPAC) and the diverse constituencies that we represent, we commend the Department of Homeland Security's (DHS) commitment to promote unbiased practices among its law enforcement agencies. While the Department of Justice's (DOJ) recent profiling guidance is a critical first step towards reducing bias-based law enforcement practices, we are concerned with the carve outs for certain activities and for key DHS agencies. As DHS implements the profiling guidance and develops its own internal policies, we urge you to close these gaps and to ensure that bias-based practices are no longer permitted by any DHS entity.

The DOJ guidance clearly states that profiling on the basis of protected characteristics—that is, race, gender, ethnicity, religion, national origin, sexual orientation, or gender identity—"is ineffective" and "morally wrong and inconsistent with [DOJ's] core values and principles of fairness and justice" because it "offends the dignity of individuals improperly targeted" and is "patently unacceptable." Yet paradoxically, the guidance excludes protections to activities in the "vicinity of the border, or to protective, or screening activities."

This gap is particularly concerning for two reasons. First, the guidance fails to define "vicinity," making it unclear as to when and where the exclusion applies. Second, by excluding certain activities and key agencies (e.g. U.S. Customs and Border Protection (CBP) and the Transportation Security Administration (TSA)), the guidance creates a two-tiered standard where certain entities and activities are covered with the full force of the guidance and others are not, thereby opening the door to patent profiling and invidious discrimination. This is especially true because border and screening activities are precisely where naked profiling has been the most pervasive.[1] The two-tiered system is a slippery slope that risks the use of bias-based profiling even in situations that are intended to be covered by the guidance.

[1] *See, e.g.*, SAALT, et. al., *In Our Own Words: Narratives of South Asian New Yorkers Affected by Racial and Religious Profiling*, March 2012 (available at http://saalt.org/wp-content/uploads/2012/09/In-Our-Own-Words-Narratives-of-South-Asian-New-Yorkers-Affected-by-Racial-and-Religious-Profiling.pdf) (highlighting that South Asians are disproportionately affected by additional TSA screening based on religious attire and that airport officials fail to follow screening protocols); *see also* The Leadership Conference, *Restoring a National Consensus: The Need to End Racial Profiling in America*, March 2011 (available at http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf) (finding that turbaned Sikh travelers consistently report that they are set aside for disparate rates of secondary screening at some TSA checkpoints, even after passing through body scanners without incident).

From the Chinese Exclusion Act of 1882 to the internment of Japanese Americans during World War II, the Asian American and Pacific Islander (AAPI) community has been historically subjected to patent profiling and xenophobia, particularly at the hands of the U.S. government. Subsequent to 9/11, this injustice increasingly fell upon American Muslim, South Asian, Sikh, Arab, and Middle Easterner communities, as well as Hispanics, blacks, and other minorities.[2] For example, a fire fighter and 20-year veteran was subject to over 10 extensive, debasing, and unwarranted interrogations by CBP since 2006, questioning his political views, religious beliefs, and other personal information.[3]

For these reasons, CAPAC urges you to adopt a single standard for all DHS agencies that prohibits profiling, without exception. In doing so, you will encourage law enforcement to rely on their expertise and credible knowledge when carrying out their duties and will provide uniformity among all law enforcement actions. This is the meaning of good law enforcement work.

Nevertheless, any new DHS policy permitting the use of profiling must be clear and narrowly construed. This is critical not only to ensure a consistent application of the guidance among all DHS law enforcement components, but also to educate and assure the public on their rights.

Moreover, we urge DHS to hold law enforcement accountable to the profiling guidance, particularly when law enforcement does, in fact, use protected characteristics in their decisions and activities. A critical way to effectuate this goal is to ensure that civilian complaints on profiling are prioritized and guaranteed review. Furthermore, we ask that DHS consider routine, independent audits of all border and screening activities.

Finally, as law enforcement components begin their data collection mandate, CAPAC urges DHS to require these components to disaggregate data according to racial and ethnic subgroups, particularly with respect to AAPIs. AAPIs are an incredibly diverse community comprised of over 50 different ethnic groups that speak over 100 different languages. Without adequate data disaggregation, it is difficult to ascertain, understand, and ultimately address the unique issues and problems facing specific AAPI subgroups.

We understand that meaningful change takes time and that DHS—with its many components—has a multitude of policy considerations to reconcile. We look forward to working with you to ensure that the civil liberties of all persons are protected and that profiling is no longer permitted by our government.

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[2] *See, e.g.*, Michael S. Schmidt and Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. TIMES, Aug. 11, 2012 (available at http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?_r=1&) (finding that TSA profiling targets not only Middle Easterners, but also blacks, Hispanics, and other minorities).

[3] Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith and Finances of Americans Returning Home*, April 2009 (available at https://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/175/attachments/original/360962344/ UnreasonableIntrusionsPR.pdf?1360962344).

Sincerely,

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CAPAC Chairwoman

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